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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 65

TIMOTHY J. BREEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (A. 12–21) is reported at 284 F. Supp. 749. The opinion of the court of appeals (A. 22–36) is reported at 406 F. 2d 636.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1969. The petition for a writ of certiorari was filed on March 10, 1969, and was granted on April 28, 1969 (394 U.S. 997). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)) prohibits pre-induction judicial re-

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view of the delinquency reclassification to I–A of a registrant previously classified II–S and deferred as an undergraduate college student.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Military Selective Service Act of 1967 and the Selective Service regulations and reprinted in Appendix A, *infra*, pp. 35–39.

STATEMENT

Selective Service System regulations authorize local boards to declare to be a delinquent any registrant who has "failed to perform any duty or duties required of him under the selective service law * * *"[1] (32 C.F.R. 1642.4(a)). The regulations also authorize the reclassification of such registrants into I–A (available for military service) (32 C.F.R. 1642.12). Although delinquents are to be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)), a delinquent registrant may, under the regulations, be removed from the status "at any time" (32 C.F.R. 1642.4(c)). A reclassified delinquent is also entitled to a personal appearance before his local board, may have his classification reopened at any time prior to induction (without regard to the normal restrictions against reopening, see 32 C.F.R. 1625.2), and may appeal his classification to the state appeal board (32 C.F.R. 1642.14). Section 10(b)(3) of the Military Selective Service Act of 1967 prohibits judi-

[1] "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. 451 *et seq.*] and all the rules and regulations issued thereunder" (32 C.F.R. 1602.10).

ial review of "the classification or processing of any egistrant" prior to his induction or refusal to submit hereto when so ordered.

On January 8, 1968, petitioner, an undergraduate tudent at the Berkeley School of Music in Boston, Massachusetts, was declared to be a delinquent by his ocal board for failing to comply with the provisions of he Selective Service law which require that he maintain his registration certificate in his personal possession at all times (32 C.F.R. 1617.1) (A. 2).[2] On January 9, 1968, his II–S (student deferment) classification was changed by his local board to I–A (A. 2).

On February 20, 1968, while petitioner's administrative appeal was still pending, he filed this preinduction suit to overturn his I–A classification and enjoin his induction into the Armed Forces (A. 2–3).[3] The district court dismissed the complaint for lack of jurisdiction, relying on Section 10(b)(3) of he Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)). That section, as already noted, prohibits judicial review of "the classification or processing of any registrant" until "after the registrant has responded either affirmatively or negatively" to an induction order (A. 12–21). The court of appeals, with one judge dissenting, affirmed (A. 22–36).

[2] In November 1967, he delivered his certificate to a Boston clergyman to protest the conflict in Vietnam (A. 2).

[3] The administrative appeal was denied subsequent to the decision of the district court dismissing the complaint (A. 24). Petitioner's induction has been stayed pending a decision by this Court.

SUMMARY OF ARGUMENT

The central question presented here is whether both courts below properly dismissed this action for want of jurisdiction in light of Section 10(b)(3)'s express bar against pre-induction judicial review. This question requires an affirmative answer. In Section 10(b)(3), Congress has prescribed a specific timetable for challenging local board decisions in the courts. Since that timetable prohibits judicial review before the registrant's induction into military service, the courts below properly dismissed the present pre-induction suit for lack of jurisdiction.

This court's decision in *Oestereich* v. *Selective Service Bd.,* 393 U.S. 233, does not require a contrary conclusion. As the court of appeals correctly noted, the situation here is distinguishable from that which led this Court in *Oestereich* to refuse to apply Section 10(b)(3)'s bar. Unlike *Oestereich,* where an explicit statutory exemption was involved, the instant case involves a registrant eligible only for a deferment which would merely postpone his military training and service, and not relieve him entirely from that obligation. And, unlike the unqualified IV–D ministerial student exemption to which Oestereich was entitled under Section 6(g) of the Act, petitioner enjoyed only a II–S college student deferment under Section 6(h)(1), which deferments are expressly subject to "such rules and regulations as [the President] may prescribe." In view of this Court's restricting its *Oestereich* opinion to statutorily granted exemptions, which reinforces the foregoing analysis, as well as the holding in *Clark* v. *Gabriel,* 393 U.S. 256, that Section

10(b)(3) precludes pre-induction judicial review where the board's action has a statutory basis and does not effectively remove an explicit and unconditional exemption, petitioner is not entitled to pre-induction review.

ARGUMENT

I. SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967 WAS PROPERLY APPLIED BY THE COURTS BELOW TO PROHIBIT THE PRE-INDUCTION JUDICIAL REVIEW OF PETITIONER'S DELINQUENCY RECLASSIFICATION FROM II-S TO I-A.

A. THE BACKGROUND AND HISTORY OF SECTION 10(b)(3) CONFIRMS THAT A PROHIBITION AGAINST PRE-INDUCTION JUDICIAL REVIEW IS ESSENTIAL TO AVOID LITIGIOUS INTERRUPTIONS OF THE NATION'S PROGRAM FOR PROCUREMENT OF PERSONNEL FOR MILITARY SERVICE

In 1940, with war breaking out around the globe, Congress determined that, although this nation was still at peace, it was "imperative to increase and train the personnel of the armed forces of the United States". This declaration of national necessity from the opening sentence of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. App. (1940 ed.) 301 *et seq.*, recites a condition which has remained more or less constant to the present day. Although almost thirty years have passed since that law was enacted, the country's survival still demands that a strong military and defense establishment be maintained. See Section 1(b) of the Military Selective Service Act of 1967 (50 U.S.C. App. 451(b)).

Since 1940, this nation's young men have generally been subject to compulsory military service under various draft laws. These laws have created a Selective Service System, and have provided for the regis-

tration of young men and for their classification, by local draft boards composed of civilians, into groups in accordance with the different categories Congress has seen fit to establish. See *United States* v. *O'Brien*, 391 U.S. 367, 377. Congress has consistently shown its awareness of the necessity for efficient procurement of men for the Armed Forces, and plainly intended that there be minimal interference with the process of selection. Local boards have thus understandably been given considerable discretion in carrying out their assigned tasks of registering, classifying, and processing men of draft age.[4] Of special significance is the fact that every draft law since 1940 has specifically provided that the administrative decisions by the local boards shall be "final".[5]

In 1944 this Court first had occasion to determine the extent to which this finality provision precluded judicial review of actions taken by the Selective Service System, in *Falbo* v. *United States*, 320 U.S. 549. In *Falbo* a registrant classified as a conscientious objec-

[4] See, as to registration, 50 U.S.C. App. 453; as to manner of selection and classification, 50 U.S.C. App. 455; as to deferments, 50 U.S.C. App. 456(h).

[5] Selective Training and Service Act of 1940, Section 10(a), 54 Stat. 893; Selective Service Act of 1948, Section 10(b)(3), 62 Stat. 618, 619–620; Universal Military Training and Service Act of 1951, 65 Stat. 75, Section 10(b)(3), 50 U.S.C. App. (1952 ed.) 460(b)(3); Military Selective Service Act of 1967, 81 Stat. 100, Section 10(b)(3), 50 U.S.C. App. (Supp. IV) 460(b)(3). A similar provision prevailed during World War I—the Selective Draft Act of 1917, Section 4, 40 Stat. 80.

tor despite his claimed entitlement to a ministerial exemption failed to obey the order of his draft board to report for assignment to civilian work in lieu of military service. He was convicted of violating the draft law. In upholding the conviction, the Court noted that the registrant could have been rejected as physically unfit had he reported, and therefore had not completed the "continuous process" of selection which Congress had devised (320 U.S. at 552–553). Emphasizing the need to avoid "litigious interruption" of the orderly and efficient raising of manpower for the Armed Forces, the Court held that Congress had not authorized judicial review, even in a criminal prosecution, of the propriety of a board's classification "before final acceptance of an individual for national service" (320 U.S. at 554).

For the rest of World War II, the courts, following *Falbo,* uniformly held that registrants could not challenge their processing or classification even as a defense to a criminal action for failing to obey a Selective Service order.[6] While judicial review of

[6] *Sirski* v. *United States*, 145 F. 2d 749 (C.A. 1); *United States* v. *Flakowicz*, 146 F. 2d 874 (C.A. 2), certiorari denied, 325 U.S. 851; *United States* v. *Estep*, 150 F. 2d 768 (C.A. 3), reversed, 327 U.S. 114; *Smith* v. *United States*, 148 F. 2d 288 (C.A. 4), reversed, 327 U.S. 114; *Fletcher* v. *United States*, 129 F. 2d 262 (C.A. 5); *Klopp* v. *United States*, 148 F. 2d 658 (C.A. 6); *United States* v. *Rinko*, 147 F. 2d 1 (C.A. 7), certiorari denied, 325 U.S. 851; *Gibson* v. *United States*, 149 F. 2d 751 (C.A. 8), reversed, 329 U.S. 338; *Shigeru Fujii* v. *United States*, 148 F. 2d 298 (C.A. 10), certiorari denied *sub nom. Tamesa* v. *United States*, 325 U.S. 868.

challenged induction orders in criminal actions was thus seemingly foreclosed by *Falbo,* the courts did recognize that there could be review of draft board action in a habeas corpus proceeding brought after induction.[7] In 1946, however, this Court, in *Estep* v. *United States,* 327 U.S. 114, made it clear that defendants could challenge the propriety of their classification as a defense to a criminal action.

In *Estep* registrants classified I–A by their local draft boards had, like Falbo, claimed to be entitled to ministerial exemptions. After exhausting their administrative appeals they were ordered to report for induction. Unlike Falbo they reported but, after being accepted for service at the induction center, they refused to submit. One sought to defend on the ground that the draft board had "acted arbitrarily and capriciously", and also claimed that there were certain procedural irregularities in the administrative processing of his appeal (327 U.S. at 117). The other contended that the denial of the ministerial exemption was "without any foundation of fact" and that he had been discriminated against because he was a Jehovah's Witness (327 U.S. at 118). The lower courts had held that these issues were immaterial to the question of their refusal to comply with the induction order, but this Court reversed and held that where a registrant has completed every step in

[7] See, *e.g., Hirabayashi* v. *United States,* 320 U.S. 81, 108 (concurring opinion); *United States ex rel. Trainin* v. *Cain,* 144 F. 2d 944 (C.A. 2), certiorari denied, 323 U.S. 795; *Biron* v. *Collins,* 145 F. 2d 758 (C.A. 5); *Shigeru Fujii* v. *United States,* 148 F. 2d 298 (C.A. 10), certiorari denied *sub nom. Tamesa* v. *United States,* 325 U.S. 868.

the Selective Service process short of submitting to induction, judicial review of the classification underlying the induction order could be had in the criminal prosecution for failing to submit.

In reaching this result, the Court concluded that the provision making decisions of Selective Service boards "final" was designed to accomplish two purposes. First, it was intended to prevent the "litigious interruption" of the Selective Service process. Allowance of judicial review of a registrant's classification following his final acceptance for service and his refusal to submit did not, however, interfere with the orderly operation of the system of manpower procurement. Second, the Court held that the finality provision was designed to prevent the courts from becoming super draft boards and was meant to limit the scope of inquiry when judicial review was had. Thus, courts could overturn a draft board's action only if it acted "so contrary to its granted authority as to exceed its jurisdiction" (327 U.S. at 120) or if the classification had "no basis in fact" (327 U.S. at 122).[8]

The result of this decision was that if, after post-induction review of the administrative record, such a defect in the local board's action was established, the registrant would be released from service if he had submitted, or would be acquitted of the criminal

[8] That standard was incorporated into the statute in amended Section 10(b)(3) in 1967. It might be noted that the scope of judicial review in habeas corpus actions is the same as in criminal actions. See, *e.g.*, *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304; *Cox* v. *United States*, 332 U.S. 442, 449 (opinion of Mr. Justice Reed).

charge of failing to submit to induction.[9] It thus became doubly clear that even if the draft board's action was challenged on the ground that it was "lawless and beyond its jurisdiction" (*Estep* v. *United States*, *supra*, 327 U.S. at 120–121), there would still be no departure from the general and well-established bar against pre-induction judicial review. Instead, "[q]uestions concerning the classification of the registrant [would have to] be raised either in a petition

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[9] Cases where no basis in fact for the classification was found include: *United States* v. *Hartman*, 209 F. 2d 366 (C.A. 2); *United States* v. *Pekarski*, 207 F. 2d 930 (C.A. 2); *Pine* v. *United States*, 212 F. 2d 93 (C.A. 4); *Wiggins* v. *United States*, 261 F. 2d 113 (C.A. 5), certiorari denied, 359 U.S. 942; *Riles* v. *United States*, 223 F. 2d 786 (C.A. 5); *Jewell* v. *United States*, 208 F. 2d 770 (C.A. 6); *United States* v. *Ransom*, 223 F. 2d 15 (C.A. 7); *Batterton* v. *United States*, 260 F. 2d 233 (C.A. 8); *Schuman* v. *United States*, 208 F. 2d 801 (C.A. 9); *Jessen* v. *United States*, 212 F. 2d 897 (C.A. 10); *Rempel* v. *United States*, 220 F. 2d 949 (C.A. 10).

Those where the registrant was found to have been deprived of due process by procedural irregularities include: *United States* v. *Fry*, 203 F. 2d 638 (C.A. 2); *Mintz* v. *Howlett*, 207 F. 2d 758 (C.A. 2); *United States* v. *Stiles*, 169 F. 2d 455 (C.A. 3); *In re Abramson*, 196 F. 2d 261 (C.A. 3); *United States* v *Bender*, 206 F. 2d 247 (C.A. 3); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3); *United States* v. *De Lime*, 223 F. 2d 96 (C.A 3); *Olvera* v. *United States*, 223 F. 2d 880 (C.A. 5); *Davis* v. *United States*, 199 F. 2d 689 (C.A. 6); *United States* v. *Diercks*, 223 F. 2d 12 (C.A. 7), certiorari denied, 350 U.S. 841; *Knox* v. *United States*, 200 F. 2d 398 (C.A. 9).

Under the Selective Draft Act of 1917 the courts were not called upon to enforce induction orders by criminal sanctions. The receipt of an order to report for induction subjected the inductee to military law. He could then be tried for desertion should he fail to report. See *Billings* v. *Truesdell*, 321 U.S. 542, 545–546, and cases there cited.

for habeas corpus or as a defense to prosecution for failure to submit to induction into the armed forces." *Witmer* v. *United States,* 348 U.S. 375, 377.

B. THE ENACTMENT OF AMENDED SECTION 10(b)(3) IN 1967 UNDERSCORES CONGRESSIONAL INSISTENCE THAT THE PROHIBITION OF PRE-INDUCTION JUDICIAL REVIEW IS A NECESSARY DETERRENT TO LITIGIOUS INTERRUPTIONS OF THE CLASSIFICATION AND INDUCTION PROCESS

Congressional reiteration of the need for avoiding pre-induction litigation challenging local board decisions was manifested in the 1967 enactment of the Military Selective Service Act. In pertinent part, amended Section 10(b)(3), enacted as part of that Act, provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after a registrant has responded either affirmatively or negatively to an order to report for induction * * *.

The purpose of Congress in amending Section 10(b)(3) was made quite clear. It was disturbed by the "apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies", although "[e]xisting law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order." H. Rep. No. 267, 90th Cong., 1st Sess., p. 30. It

therefore provided in unmistakable language that there was to be no judicial review of a Selective Service classification—or related actions—until "after a registrant has responded either affirmatively or negatively" to an induction order, thus codifying what had previously been accepted as the existing law. See *Witmer* v. *United States, supra.*

In the words of Senator Russell, Chairman of the Senate Armed Services Committee (paraphrasing this Court in *Falbo* v. *United States,* 320 U.S. 549, 554), the amendment was designed "to prevent litigious interruptions of procedures to provide necessary military manpower." 113 Cong. Rec. 15426.[10] See *Clark* v. *Gabriel,* 393 U.S. 256, 258–259. The congressional aim was not to deny review entirely, but rather to postpone it. It reflected a considered legislative judgment, entitled to considerable weight by the courts, that any hardship and risk entailed thereby were outweighed by the need for a system which could function effectively and expeditiously in raising manpower for the nation's defense and security.

Pursuant to Article III, Section 1, of the Constitution, Congress has the power to "define and limit the jurisdiction of the inferior courts of the United

[10] The Senate was prepared merely to reaffirm "the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." S. Rep. No. 209, 90th Cong., 1st Sess., p. 10. The House, however, deemed it of utmost importance that there be no pre-induction judicial review and recommended that Section 10 (b) (3) be amended to prohibit it specifically and flatly. H. Conf. Rep. No. 346, 90th Cong., 1st Sess., p. 16.

States." *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330;[11] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331. Section 10(b)(3) is a valid exercise of this power, as well as the power of Congress under Article I, Section 8, to raise and support armed forces. See *United States* v. *O'Brien, supra*, 391 U.S. at 377. As this Court said in *Falbo* v. *United States, supra*, 320 U.S. at 554, "Congress was not required to provide for judicial intervention before final acceptance of an individual for national service". Indeed, the courts have, with rare exceptions, declined so to interfere with the selection process. Congress, in amending Section 10(b)(3), merely confirmed and made explicit this accepted rule.[12]

[11] Thus, for example, this Court has sustained the Emergency Price Control Act of 1942 (56 Stat. 23), withdrawing jurisdiction over challenges to regulations and orders issued pursuant to that Act from the inferior federal courts and vesting it in the Emergency Court of Appeals (*Lockerty* v. *Phillips*, 319 U.S. 182), and precluding the consideration of the validity of price regulations issued under that Act as a defense to a criminal prosecution for their violation initiated in the district courts. *Yakus* v. *United States*, 321 U.S. 414. See also *United States* v. *Ruzicka*, 329 U.S. 287, where the Court, noting the necessity to avoid delay in the administration of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), held that producers could not assert the illegality of an order issued thereunder as a defense in a civil suit for enforcement, but had to file a challenge with the Secretary of Agriculture with subsequent judicial review. Similarly, in *Heikkila* v. *Barber*, 345 U.S. 229, this Court sustained the limitation of judicial review of deportation orders to habeas corpus actions.

[12] That Congress has consistently intended to limit judicial review to post-induction actions is underscored by the Senate Report on the Selective Service Act of 1948: "No changes have been made in the nature of judicial review of selective-service classifications. Instead, it is contemplated that the *procedure and*

C. THERE CAN BE NO SERIOUS QUESTION AS TO THE CONSTITUTIONALITY OF SECTION 10(b)(3)

Petitioner's constitutional arguments as to the asserted invalidity of Section 10(b)(3) were before this Court in *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, and in the companion case decided along with it—*Clark* v. *Gabriel, supra.* At that time, as noted in the opinion below, the constitutional claims there asserted were "rejected *sub silentio* in *Gabriel*" (A. 27). Indeed, this Court's opinion in *Gabriel* expressly rejected the argument that Section 10(b)(3)'s bar against pre-induction judicial review is unconstitutional. There the Court said it found "no constitutional objection" to the deferral of challenges to most board actions until after induction, and cited the *Falbo* and *Estep* cases with apparent approval (393 U.S. at 259). In *Oestereich* itself the Court stated that its "construction leaves § 10(b)(3) unimpaired in the normal operations of the Act" (393 U.S. at 238). See, also *Boyd* v. *Clark*, 393 U.S. 316. In view, then, of the holding in *Gabriel* and the language in the *Oestereich* opinion, petitioner's argument as to the unconstitutionality of Section 10(b)(3) is untenable and does not call for more extended discussion.

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scope of review defined by the Supreme Court in enforcing the 1940 Act will be equally applicable under this legislation. (See *Falbo* v. *United States* (320 U.S. 549); *Estep* v. *United States* (327 U.S. 114, 122–123); *Cox* v. *United States* (332 U.S. 442, 448–449)" (emphasis added). S. Rep. No. 1268, 80th Cong., 2d Sess., p. 20. This history refutes petitioner's contention (Pet. Br. 29–31) that in the 1948 Act Congress merely meant to limit the scope of judicial review rather than its timing. In any event, the recent amendment to section 10(b)(3) removes any doubt on this score.

D. THIS COURT'S *OESTEREICH* DECISION IS DISTINGUISHABLE AND IS NOT CONTROLLING HERE

In attempting to avoid the bar of amended Section 10(b)(3), petitioner seeks to bring his situation within the limited rationale of *Oestereich* v. *Selective Service Bd., supra.* Petitioner maintains that the same clash between a clear statutory mandate and the provisions of Section 10(b)(3) that the Court found present there is equally present here. However, the instant case is distinguishable from *Oestereich,* and the courts below correctly applied Section 10(b)(3) in light of the differing circumstances.

Oestereich involved a divinity student who, pursuant to Section 6(g) of the Act (50 U.S.C. App. 456(g)), was classified IV–D and was expressly "exempt from training and service". As a protest against the conflict in Vietnam, Oestereich returned his registration certificate to the government. Shortly thereafter, his local draft board declared him to be a delinquent for failing to have the certificate "in his personal possession at all times" (as required by 32 C.F.R. 1617.1), pursuant to 32 C.F.R. 1642.4. He was thereupon reclassified I–A and was ordered to report for induction. He brought suit to review his reclassification and enjoin his induction. Relying on Section 10(b)(3), the district court dismissed the complaint and the court of appeals affirmed.

In the government's brief in this Court, it was conceded that as a full-time ministerial student Oestereich was entitled to the unequivocal exemption afforded such registrants by Section 6(g) of the Act. It was on

that basis that we suggested—and this Court ruled—that Oestereich was entitled to retain his ministerial student exemption and that there was no statutory authorization for his reclassification into I-A pursuant to regulations which were triggered by "activities or conduct not material to the grant or withdrawal of the exemption" (393 U.S. at 237). In such circumstances, the Court concluded that to compel a registrant, who was clearly *exempt* by statute from military service to submit nonetheless to induction (or to face criminal prosecution) in order to establish his "plain and unequivocal" and *uncontested* right to such an exemption, would be unduly harsh (393 U.S. at 238). Accordingly, in reconciling the two apparently inconsistent provisions, the Court determined that Congress could not have intended Section 10(b)(3) to be applicable in such a situation, and held that "pre-induction judicial review is not precluded in cases of this type" (393 U.S. at 239).

The exception to the express bar of Section 10(b)(3) carved out by this Court in *Oestereich* is a narrow one and should, in our view, be sparingly employed. As recently noted by the Sixth Circuit, this exception was "meticulously confined to the application of the delinquency regulations to a statutory exemption" *Anderson* v. *Hershey*, 410 F. 2d 492, 494, pending on petition for a writ of certiorari, No. 449, this Term. Indeed, the *Oestereich* opinion indicates that the Court painstakingly and deliberately limited the reach of its holding there—and by implication the underlying rationale—to situations involving a reg-

istrant allegedly entitled to a statutory exemption. In the dispositive paragraphs of its opinion (393 U.S. at 236–239), the Court referred to the concept of a "statutory exemption" at least a dozen times, but made no reference whatever to the matter of deferments from service, insofar as the operation of Section 10(b)(3) is concerned. The dissenting opinion, moreover, acknowledged that "[t]he Court seems to limit its holding to statutory 'exemptions'" (393 U.S. at 249, n. 9), although suggesting, presumably by way of criticism, that "'deferments' may just as 'plainly' preclude a registrant's induction" (*ibid.*).

To be sure, the Court did not have before it in *Oestereich* the question of the application of Section 10(b)(3)'s bar to deferred as distinguished from exempt registrants who had been reclassified. But the purposeful restriction of the language in *Oestereich* to the exemption situation cannot be dismissed lightly. Under this analysis, even where it is alleged that a draft board has misapplied the statutory standard, Section 10(b)(3) will bar pre-induction judicial review except where a statutorily mandated exemption was previously enjoyed and is presently claimed by the registrant. As indicated by Mr. Justice Douglas, the author of *Oestereich*, in his concurring opinion in *Clark* v. *Gabriel, supra,* 393 U.S. at 260, "it takes the extreme case where the Board can be said to flout the law * * * to warrant pre-induction review of its actions." Moreover, Section 10(b)(3) also applies to those situations where some provision of the Act is challenged on constitutional grounds in cases where the exercise of judgment by the local board is not necessarily at

issue. *Boyd* v. *Clark*, 393 U.S. 316. In sum, *Oestereich* "leaves § 10(b)(3) unimpaired in the normal operations of the Act" (393 U.S. at 238).

All of the courts of appeals which have considered the question have held that Section 10(b)(3) prohibits pre-induction review of the delinquency reclassification of registrants who claim a continuing entitlement to deferment. *Anderson* v. *Hershey, supra* (undergraduate student deferment, dependency deferment and registrant classified as unfit for service); *Kolden* v. *Selective Service Local Bd. No. 4*, 406 F. 2d 631 (C.A. 8) (graduate student deferment);[13] *Kraus* v. *Selective Service System Local 25*, 408 F. 2d 622 (C.A. 4) (dependency deferment).[14] Thus, the Fourth, Sixth, and Eighth Circuits, as well as the Second Circuit in its decision below, have all construed *Oestereich* as being limited to the *exemption* situation, and as not impinging upon the application of Section 10(b)(3)'s bar where *deferments* are involved. See also this Court's denial of stays in *Shiffman* v. *Selective Service Local Bd. No. 5*, 391 U.S. 930 (occupational deferment), and *Zigmond* v. *Selective Service Local Bd. No. 16*, 391 U.S. 930 (registrant over 26).[15]

[13] *Kolden* is pending on a petition for a writ of certiorari, No. 70, this Term. There the court of appeals refrained from expressing a view on the applicability of Section 10(b)(3)'s bar to undergraduate students having II–S deferments (see 406 F. 2d at 635, n. 6).

[14] *Kraus* is pending on a petition for a writ of certiorari, No. 331, this Term.

[15] *Zigmond* involved a First Circuit decision rendered prior to *Oestereich*.

Some of the reasoning of these courts of appeals in reading *Oestereich* restrictedly is pertinent and helpful here. After careful consideration the court below found the "conflict between statute and regulations that arose in *Oestereich*" not to be presented in the instant case. In *Kraus* the Fourth Circuit drew a sharp distinction between exempt and deferred registrants, insofar as the availability of pre-induction judicial review is concerned, concluding that "[t]he only exception to the deferment of judicial review [as prescribed in Section 10(b)(3)] recognized by the Supreme Court arises from administrative action that deprives a registrant of a statutory exemption" (408 F. 2d at 625). In *Anderson* the Sixth Circuit, while noting that the Court in *Oestereich* "did not articulate any difference between exemption and deferment" and "restricted itself to the statutory exemption problem," discerned a difference from the Court's "repeated confinement of its ruling to the case of one exempt by statute" (410 F. 2d at 494). As the court explained (*ibid.*):

> In the case of an exemption, the Congress has made the decision that qualifying persons shall be beyond the pool of manpower available for military purposes. In the case of a deferment, the Congress has tried to set priorities, to provide predictability, and to guarantee equality of treatment—but not immunity—for those within the available pool of manpower. An exempt person is predetermined to be outside the system; a deferred person is within. We deem this a significant line of demarcation.

These considerations apply fully in the instant case. A registrant seeking the benefit of the *Oestereich* exception must establish his eligibility for a statutory exemption from military service, as opposed to a deferment, and perhaps show as well a concession by the government that he is entitled thereto. As conceded by the government, Oestereich was statutorily exempt from service as a ministerial student. He therefore had only limited contacts with the Selective Service System, designed only to ensure that he remained entitled to that exemption. Petitioner, however, as a college student, simply had his liability to conscription deferred. By the explicit terms of the statute his deferment, unlike the unqualified exemption held by Oestereich, was subject to the "rules and regulations" of the Selective Service System and will terminate when he reaches 24 years of age, when he ceases to perform satisfactorily in his studies, or when he receives his baccalaureate degree. See Section 6(h)(1) of the Act (50 U.S.C. App. (Supp. IV) 456(b)(1)). Section 6(g) under which Oestereich was exempted, is unconditional and contains no reference to administrative discretion in its construction and application (see 393 U.S. at 234-235). While Section 6(h)(1) directs the deferment of college students, it does so "under such rules and regulations as [the President] may prescribe". Indeed, prior to 1967, college student deferments were, as petitioner notes (Pet. Br. 13–14), entirely a matter of administrative regulation, without any statutory direction whatsoever (see 50 U.S.C. App. 456(h) and (i)).

Unlike the *exempted* registrant, then, petitioner remains part of the "pool of manpower available for

military purposes" (*Anderson* v. *Hershey, supra,* 410 F. 2d at 494), even though *deferred.* It is of special importance that he comply with the pertinent regulations so that his local board may be fully apprised of his current status and that he may be fully cognizant of his obligations with regard to the maintenance of that status. *United States* v. *O'Brien, supra,* 391 U.S. at 377–378; *Anderson* v. *Hershey, supra,* 410 F. 2d at 495–498; *United States* v. *Miller,* 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911. And, as noted by the Court of Appeals for the Second Circuit in *United States* v. *Miller, supra,* 367 F. 2d at 81, the "proper functioning of the system depends upon the aggregated consequences of individual acts; in raising an army no less than in regulating commerce, cf. *Wickard* v. *Filburn,* 317 U.S. 111, 127–128, * * * the seriousness of an individual's acts must often be assessed not only in isolation but under the assumption that they may be multiplied manifold."

Moreover, the requirement that the deferred registrant (as opposed to one exempted from service) maintain his draft cards in his personal possession is an element in the process of establishing and continuing his deferment and thus contributes to the efficient procurement of men for the Armed Forces. Congress has recognized this and, in addition to the general criminal sanctions applicable to violation of the statute or the rules and regulations (Section 12(a), 50 U.S.C. App. (Supp. IV) 462(a)), has imposed specific criminal penalties dealing with the "possession" of draft cards. Section 12(b)(6) (50 U.S.C. App. (Supp IV) 462(b)(6)). That Congress is concerned with the function served by draft cards and the requirement that

they be kept in the registrant's personal possession is shown by its recent action in attaching criminal penalties to their destruction or mutilation. Public Law 89–152, amending Section 12(b)(3), 50 U.S.C. App. (Supp. IV) 462(b)(3), upheld in *United States* v. *O'Brien, supra.*[16] In view of this, and since the requirement that a deferred registrant maintain possession of his draft cards [17] plays an important role in the Selective Service System's processes, it is clear that Congress has approved the withdrawal of deferments from those who refuse to comply with the possession requirement and are, as a result, declared delinquents. Indeed, the very provision which relates to undergraduate deferments, Section 6(h)(1), also expressly recognizes the delinquency procedures.[18]

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[16] The contention in petitioner's brief in *Gutknecht* (incorporated by reference by petitioner here (Pet. Br. 6)) that Congress could not specifically forbid an act already proscribed by some general provision was specifically rejected by this Court in *O'Brien* (see 391 U.S. at 380).

[17] "Every [registrant] *must* * * * have in his personal possession at all times his Registration Certificate * * *" (32 C.F.R. 1617.1; emphasis added). "Every person who has been classified by a local board *must* have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification * * *" (32 C.F.R. 1623.5; emphasis added). These express commands refute petitioner's contention that a registrant has no duty to maintain these cards in his personal possession.

[18] Section 6(h)(1), as amended in 1967, provides that after a registrant has been deferred as an undergraduate he is to be liable for induction "within the prime age group." "Prime age group" is then defined as "the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers".

It follows that the delinquency regulations should be viewed as applying with full force to deferred, as distinguished from exempt, registrants, notwithstanding *Oestereich*.

E. THE *OESTEREICH* EXCEPTION SHOULD BE LIMITED, FOR POLICY REASONS, TO STATUTORY EXEMPTION SITUATIONS

A distinction between exemptions and deferments, in regard to the applicability of Section 10(b)(3), is consistent with and reflective of the congressional policy manifested in that provision. Section 10(b)(3) cannot, as the Court pointed out in *Oestereich*, "sustain a literal reading" (393 U.S. at 238), since, *inter alia*, it does not expressly provide for review of classifications in habeas corpus proceedings in which an inductee seeks release from active duty (see United States Constitution, Article I, Section 9).[19] It was not read literally in *Oestereich*, but was construed so as to harmonize its language with other provisions of the Act.

Limiting the *Oestereich* exception to statutory exemptions would create a relatively small gap in the general bar on the "litigious interruptions" of the selection and processing of registrants for service as a result of pre-induction suits. Only ministers and ministerial students (50 U.S.C. App. 456(g)), individuals under 19 years of age and over a variable age limit determined periodically by Congress (50 U.S.C. App. 454, 455), veterans of military service

[19] However, in referring to review after a registrant had "responded either *affirmatively* or negatively to an order to report for induction." (emphasis added), Section 10(b)(3) at least impliedly contemplates the post-induction challenge of classifications in habeas corpus proceedings.

(50 U.S.C. App. 456(b)), reservists (50 U.S.C. App 456(c)), and sole surviving sons (50 U.S.C 456(o) appear to qualify for statutory exemptions unde existing legislation. The number of individuals i those categories whose service is likely to be sough is rather insignificant when compared with those a ready classified I–A or those having dependency, hard ship, occupational, and student deferments. The sug gested distinction between exempt and deferred regis trants would accordingly serve to achieve in prin ciple the objective intended by Congress in enactin Section 10(b)(3).

Any other result would substantially undermin the thrust of that provision and effectively read it ou of the Act, while opening the doors to a flood of pre induction litigation which could substantially impai the Selective Service System's operation in provid ing needed manpower. *Oestereich* should not be rea as allowing pre-induction judicial review of "an alleged board violation of a clear legal duty", as peti tioner urges (Pet. Br. 21). This would convert th courts into super draft boards and add another laye of review, available as of course, to the administra tive tier that already exists. The resulting disruptio of the system could well be chaotic. A far more com pelling case than petitioner has made would be nec essary before such a result should be given judicia sanction, in the face of a congressional determinatio to the contrary.

The foregoing considerations necessarily lead, w submit, to the conclusion that this case differs marked ly from *Oestereich,* and that the holding there is dis

tinguishable and not controlling here. There, we conceded that a ministerial student's express and unequivocal statutory *exemption* could not have been intended to be subject to termination through application of the delinquency regulations without judicial review. No such concession is made here, in view of the language in the *Oestereich* opinion and the policy reasons which support a narrow reading of the *Oestereich* exception to Section 10(b)(3)'s bar. Congress has explicitly subjected *deferments* to the "rules and regulations"—including the delinquency regulations—of the Selective Service System with full awareness of the possible results. Thus the elements in *Oestereich* which led this Court to fashion an exception to Section 10(b)(3) are lacking here and the express statutory bar to pre-induction judicial review accordingly should be held applicable.

II. THERE IS NO MERIT TO ANY OF PETITIONER'S OTHER CONTENTIONS

We have demonstrated above that the courts below correctly held that Section 10(b)(3) validly prohibits pre-induction judicial review of petitioner's delinquency reclassification. In view of that threshold bar to this action, the courts below properly refused to pass on the underlying merits of petitioner's contentions. For the same reason, this Court need go no further. However, even if those underlying contentions were to be considered, it is clear that there is no merit to petitioner's claim that he has been deprived of any constitutional or other rights.

A. PETITIONER'S FIRST AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

There is no merit to petitioner's contention that he has a protected First Amendment right not to carry his draft card. First, it should be noted that the pertinent regulations are precise and narrowly drawn, fully apprising every registrant of his obligation to maintain both his registration certificate and his notice of classification "in his personal possession at all times" (32 C.F.R. 1617.1, 1623.5). Indeed, the documents themselves bear this legend. "There is no lack of notice", "nothing to entrap or fool the unwary" (*Adderley* v. *Florida*, 385 U.S. 39, 42). Second, there is no evidence that the local board considered anything besides petitioner's failure to maintain his registration certificate in his personal possession as a basis for the reclassification. The district court found (A. 4) and petitioner did not dispute (see A. 3) that "[t]he Board's actions were entirely by virtue of the draft regulations". Petitioner's bare allegations, unsupported by offers of proof, that the local board improperly considered the October 1967 letter and memorandum of General Hershey in declaring him to be a delinquent does not alter this fact. One month prior to the time when petitioner was declared to be a delinquent, the then Attorney General, in a joint statement with General Hershey, made it abundantly clear that delinquency reclassification is permitted only when a registrant "violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or

failing to have a draft card)", and that "[l]awful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration [of induction] or any other special administrative action by the Selective Service System" (App. B. 41–42).

We fully endorse this position and, for the convenience of the Court, have reprinted the entire text of this Joint Statement as Appendix B to this brief. Against this background, the evenhanded application of precise and narrowly drawn regulatory provisions, which are not designed to stifle free expression, do not run afoul of the First Amendment, regardless of the motives of the protestors. *United States* v. *O'Brien*, *supra*; *Cameron* v. *Johnson*, 390 U.S. 611.

Petitioner, although admittedly aware of the possession requirement, deliberately violated the regulations in an attempt to protest this nation's involvement in Vietnam. Such violation is privileged, he contends, because he sought to express an idea by the illegal act. This is an erroneous notion. While the First Amendment protects speech-related conduct,[20] the mere intent to express an idea does not bring an otherwise illegal act within its protective sphere. *Cox* v. *Louisiana*, 379 U.S. 559, 564.[21] Stated another

[20] *E.g.*, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503; *Stromberg* v. *California*, 283 U.S. 359.

[21] See also *People* v. *Stover*, 12 N.Y. 2d 462, 191 N.E. 2d 272, appeal dismissed for want of a substantial federal question *sub nom. Stover* v. *New York*, 375 U.S. 42; *People* v. *Street*, 20 N.Y. 2d 231, 229 N.E. 2d 187, reversed on another ground *sub nom. Street* v. *New York*, 394 U.S. 576. As the Court of Appeals for the Second Circuit so aptly noted in *United States* v. *Miller*, *supra*, "The range of symbolic con-

way, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (*United States* v. *O'Brien, supra,* 391 U.S. at 376). This Court has outlined the tests to be applied as follows (391 U.S. at 377):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * *

With these tests in mind, the Court upheld the provision which made it a criminal offense to knowingly destroy or mutilate draft cards. *United States* v. *O'Brien, supra. A fortiori,* the regulations presently under consideration do not abridge petitioner's First Amendment rights. *National Student Ass'n* v. *Hershey,* 412 F. 2d 1103, 1117 (C.A.D.C.). We recognize that, given certain circumstances, a perfectly valid law could be used improperly to stifle dissent. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479; *Cameron* v. *Johnson, supra,* 390 U.S. at 621. However, such circumstances are not present here. Petitioner was declared to be a delinquent not because he expressed dissent,

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duct intended to express a disapproval is broad; it can extend from a thumbs-down gesture to political assassination. Would anyone seriously contend that the First Amendment protects the latter?" (367 F. 2d at 79).

but because he violated an important regulation, the enforcement of which "is unrelated to the suppression of free expression" and which "furthers an important" and "substantial governmental interest".

B. APPLICATIONS OF THE DELINQUENCY REGULATIONS IS NOT PUNISHMENT

The non-punitive nature of the delinquency procedures is discussed at length in our brief in the companion case of *Gutknecht* v. *United States,* No. 71, this Term. We think it important, however, to reiterate here that the regulations do not impose punishment but are a non-criminal device designed to bring the registrant into compliance with his duties under the law. As already noted, they provide that should a registrant fail to perform certain duties required by law (defined as including the regulations, see 32 C.F.R. 1602.10), he may be declared to be a delinquent, reclassified I–A and ordered to report for induction with the highest priority (32 C.F.R. 1642.4, 1642.12, 1631.7). Thus, the delinquency regulations render self-defeating any attempt by the registrant to cut himself off from the system and evade service. But, unlike a criminal penalty which is irreversible, a delinquency may be removed at any time up to actual induction once the registrant brings himself back into compliance. The regulations are thus remedial rather than punitive, designed to correct rather than to punish.

In essence, then, the delinquency regulations are analogous to the civil contempt sanction since they are a means whereby registrants are encouraged to

perform their duties under the pertinent laws and regulations.[22] They are designed merely to regulate conduct, not to punish. This is why petitioner's analogy to *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, must fail. In that case the Court held that automatic forfeiture of citizenship was punishment and could not be imposed without according the individual various constitutional safeguards. However, unlike the situation in *Mendoza-Martinez* (where once the forfeiture was triggered it could not be retrieved), a registrant's delinquency status may be cured by compliance. Moreover, as already noted, the delinquency procedures have built-in administrative safeguards which grant a registrant who has been reclassified the right of a personal appearance and an appeal. Furthermore, his classification may be reopened without regard to the normal restrictions against reopening (32 C.F.R. 1642.14). The superficial similarities between the tests the *Mendoza-Martinez* Court used to determine the penal nature of the sanction there imposed (372 U.S. at 108–109) and the at-

[22] We recognize that the analogy to civil contempt may be incomplete since the regulations leave it to the local board's discretion whether to remove the delinquency (see 32 C.F.R. 1642.4(c)). However, as we point out in our brief in *Gutknecht*, a local draft board's refusal to permit a registrant, acting in good faith, to bring himself into compliance with the regulations and thereby remove his delinquency would be an abuse of discretion. Indeed, an automatic removal provision might very well encourage repetitious and willful disregard of the regulations by a registrant who knows that temporary com-

tributes of the delinquency regulations are thus really beside the point.[23]

Penal statutes punish past actions—the robber is not allowed to undo the robbery, *Mendoza-Martinez* was not allowed to undo his violation of 1940 draft law (going to Mexico to evade service) with its attendant consequences under the immigration laws. On the other hand, the delinquency regulations, like civil contempt, are wholly remedial and are designed to secure compliance without punishment. Petitioner has failed to bring himself into compliance. In short, he has carried "the keys" to the restoration of his II–S deferment in his own pocket, but has not seen fit to use them. *In re Nevitt,* 117 Fed. 448, 461 (C.A. 8).

While the delinquency regulations are designed to ensure compliance with the Selective Service law short of the imposition of criminal sanctions, it is clear that should a registrant fail to cure his delinquency, a sanc-

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pliance would force the removal of his delinquency. The local boards have been properly given discretion in this regard.

[23] As Mr. Justice Jackson noted in a different context, "one man's comfort and inspiration is another's jest and scorn" (*Board of Education* v. *Barnette*, 319 U.S. 624, 633). So it is with what constitutes punishment. While service in the Armed Forces of this country has traditionally been considered a privilege and an accepted duty of citizenship, certainly those who have to be dragged off kicking and screaming do not look upon it quite so favorably. The induction process, however, has always been regarded as civil and conscription has never been conditioned on the existence of the usual prerequisites to the imposition of criminal sanctions. See, e.g., *McCoy* v. *United States*, 403 F. 2d 896 (C.A. 5); *Brown* v. *United States*, 401 F. 2d 769 (C.A. 5); *Fults* v. *United States*, 395 F. 2d 852 (C.A. 10); *United States* v. *Dicks*, 392 F. 2d 524 (C.A. 4); *Nickerson* v. *United States*, 391 F. 2d 760 (C.A. 10), certiorari denied, 392 U.S. 907.

tion accrues and he is ordered to report for induction as a priority inductee (32 C.F.R. 1631.7(a)(1)). However, at this stage the registrant may have the validity of his classification and induction determined by a civilian court with all of his Fifth and Sixth Amendments rights reserved. The registrant may either submit to induction and test the validity of his "classification or processing" by way of habeas corpus, or may refuse to submit and test it as a defense to his criminal prosecution. Thus, application of the delinquency regulations does not present any serious questions under the Fifth and Sixth Amendments since the rights protected by these constitutional provisions are available once the sanction imposed by the delinquency procedures actually accrues.[24]

C. PETITIONER WAS NOT DEPRIVED OF ANY PROTECTED RIGHT EVEN THOUGH HE RECEIVED HIS DELINQUENCY NOTICE AND HIS NOTICE OF RECLASSIFICATION ON THE SAME DAY

There is little merit to petitioner's contention that he was entitled to notice of his delinquency prior to his reclassification. The regulations require only that a delinquency must be declared prior to a reclassification. This was done here. The fact of a reclassifica-

[24] Analogy may be made to grand jury proceedings where, although an indictment with its attendant adverse consequences may result, there is no right to counsel, confrontation and cross-examination of witnesses or other safeguards which necessarily condition the imposition of punishment. See, *e.g.*, *In re Groban*, 352 U.S. 330, 333; *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897. However, once an indictment is returned, the defendant's constitutional rights are fully protected in the resulting criminal trial.

tion does not prevent the removal of the delinquency, which may be done "at any time" (32 C.F.R. 1642.4 (c)). Furthermore, the reclassified delinquent may contest the reclassification, and the underlying delinquency, at his personal appearance before his draft board (which may reopen the classification without regard to the normal restrictions against reopening) and in the course of his administrative appeals (32 C.F.R. 1642.14). Additionally, petitioner can hardly claim prejudice, for there has been no showing that he would in any event have attempted to cure his delinquency prior to his reclassification. In fact, petitioner has to date continually refused to comply with the regulations and maintain his registration certificate in his personal possession.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Statutes and Regulations Involved

1. Pertinent statutory provisions provide as follows:

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)) provides:

* * * * *

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix, 50 U.S.C. App.], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

* * * * *

Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456(h)(1)) provides:

* * * * *

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted

to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under section (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Pertinent provisions of the Selective Service regulations provide:

32 C.F.R. 1617.1 Effect of failure to have unaltered registration certificate in personal possession.

Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register.* * *

32 C.F.R. 1623.5 Persons required to have Notice of Classification (SSS Form No. 110) in personal possession.

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. * * *

32 C.F.R. 1642.4 Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a regis-

trant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perfom. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

32 C.F.R. 1642.12 Classification of delinquent registrant.

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances: *Provided,* That a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified or reclassified into Class I-A, Class I-A-O or Class

I–O under this section unless such action is specifically authorized by the Director of Selective Service.

32 C.F.R. 1642.14. Personal appearance, reopening, and appeal.

(a) When a delinquent registrant is classified in or reclassified into Class I–A, Class I–A–O or Class I–O under the provisions of this part, a personal appearance may be requested and shall be granted under the same circumstances as in any other case.

(b) The classification of a delinquent registrant who is classified in or reclassified into Class I–A, Class I–A–O or Class I–O under the provisions of this part may be reopened at any time before induction or before the date he is to report for civilian work in the discretion of the local board without regard to the restrictions against reopening prescribed in section 1625.2 of this chapter.

(c) When a delinquent registrant is classified in or reclassified into Class I–A, Class I–A–O or Class I–O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case.

APPENDIX B

Joint Statement of Attorney General Ramsey Clark and Director of Selective Service Lewis B. Hershey, Issued December 9, 1967

The Department of Justice has established a special unit in the Criminal Division to coordinate prompt prosecution of offenses against the Selective Service laws and related statutes. The responsibilities of this unit include prosecution of violations of provisions of the Selective Service law making it unlawful knowingly to counsel, aid, or abet others to refuse to register or serve, or knowingly to interfere by force or violence or otherwise with the administration of the System. This unit also has responsibility for prosecution of violations of the related statutes outlawing interference with the Armed Forces or obstruction of recruiting and enlistments. The special prosecution unit is under the direction of John Van de Kamp, formerly U.S. Attorney for the Central District of California and now Deputy Director of the Executive Office for U.S. Attorneys.

All U.S. Attorneys have been instructed to speed up investigation and prosecutorial recommendations on these cases. They have also been directed to cooperate with local law enforcement officials and to urge them to vigorously prosecute violations of local laws which may occur in demonstrations against the Selective Service System.

It has long been the law that a registrant who violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or failing to have a draft card) may be

declared a "delinquent" registrant by his local draft board. Under consistent practice, information received by federal law enforcement officials regarding a registrant's own status is turned over to his local draft board for appropriate action. When a person is declared to be a delinquent registrant by his local board, he may be reclassified and become subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the enactment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts.

Lawful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration or any other special administrative action by the Selective Service System. Activities which violate federal law will be dealt with under the procedures outlined above depending upon the nature of the conduct. The lawful exercise of rights of free expression and peaceful assembly have incurred and will incur no penalty or other adverse action. These rights are guaranteed by the Constitution. They are vital to the preservation of free institutions, which our men in Vietnam are fighting to protect.

No single statement can cover the myriad different factual situations presented by the conduct of individual registrants. In approaching these situations, we will continue to work to preserve the integrity and effective operation of the Selective Service System while fully protecting the constitutional rights of the registrants.

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